

Miller
143703



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: High Country Equipment, Inc.

File: B-242669

Date: April 19, 1991

Leonard Stephenson for the protester.
Allen W. Smith, Department of Agriculture, for the agency.
Behn Miller and Christine S. Melody, Esq., Office of the
General Counsel, GAO, participated in the preparation of the
decision.

DIGEST

Where solicitation permitted bidders to bid on an "all or none" basis and did not expressly prohibit similarly restricted bids, agency improperly rejected bid as nonresponsive based on bidder's written qualification that it would not accept award for more than 35 items; the 35-item statement was analogous to an "all or none" qualification and because it only qualified the size of the award the bidder was seeking, neither the rights of the government nor the bidder's obligation to perform as specified under the solicitation were affected. Protest challenging rejection of bid nevertheless is denied since even if protester's bid had been properly considered, protester would not be in line for award because awardee was the only bidder who could meet agency's needs by supplying all of the required items.

DECISION

High Country Equipment, Inc. protests the award of a contract to Carlson Chevrolet under invitation for bids (IFB) No. R6-18-91-270, issued by the Department of Agriculture for the rental of vehicles by the Forest Service in Willamette National Forest; the vehicles are to be used to haul personnel, tools, material, and equipment in the performance of various projects ranging from wildlife research to road and trail construction. High Country contends that its bid was improperly rejected as nonresponsive.

We deny the protest.

BACKGROUND

The IFB was issued as a small business set-aside on December 4, 1990, and requested bids on 100 vehicles with varying rental periods; under the solicitation, each vehicle represented 1 line item. Bid opening was scheduled for January 2, 1991. By amendment No. 1, issued December 12, 1990, several Federal Acquisition Regulation (FAR) provisions were incorporated into the IFB; by amendment No. 2, issued December 20, the number of vehicles was reduced to 98.

Four small businesses submitted bids: Midvalley Leasing Inc. bid on 2 line items, Crest Development Company bid on 24 line items, High Country Equipment submitted a bid for 82 line items, and Carlson Chevrolet submitted a bid for each of the IFB's 98 line items. The IFB provided that bidders could qualify their bids as offering "all or none" of the line items; Carlson was the only company who elected to bid on this basis.

At bid opening, High Country Equipment was determined to be the low bidder on 19 items. Beneath its signature on the bid, High Country added the following statement:

"We cannot furnish more than 35 items total and do not wish to be awarded fewer than four minimum."

Because the contracting officer believed this qualification limited the rights of the government under the IFB, the contracting officer rejected High Country's bid as nonresponsive. On January 8, the agency awarded a contract for all the line items to Carlson.

By letter dated January 8, High Country protested the rejection of its bid as nonresponsive to the contracting officer; by letter dated January 9, the contracting officer denied the protest. On January 15, High Country filed its protest with our Office. The agency proceeded with award to Carlson on March 4.

Although High Country's bid was improperly rejected as nonresponsive, we find that award to Carlson was proper.

HIGH COUNTRY'S BID QUALIFICATION

The agency asserts that High Country's bid was nonresponsive because its 35-item qualification limited the rights of the government by qualifying the number of vehicles that the government could order.

A bid is responsive only if the bidder has unequivocally offered to provide the requested items or services in total conformance with the requirements specified in the IFB. Power Ten, Inc., B-236725, Dec. 18, 1989, 89-2 CPD ¶ 563. Where a bidder qualifies its bid to protect itself or reserves rights, which are inconsistent with a material provision of the IFB, the bid must be rejected as nonresponsive. Id.; see also FAR § 14.404-2(d).

However, if there is no prohibition in the IFB against conditions limiting the size of the award the bidder is seeking, the imposition of such a condition by the bidder will not render the bid nonresponsive; such a limitation does not affect the government's right to award a contract on the items for which the bidder was eligible, nor does such a limitation change the bidder's obligation to perform in accordance with terms and conditions of the IFB. See Orvedahl Constr. Inc., 63 Comp. Gen. 288 (1984), 84-1 CPD ¶ 405. Accordingly, where a solicitation does not expressly prohibit "all or none" or similarly restricted bids, a bidder may properly place such conditions on award. See FAR § 14.404-5; 1/ Phillips Cartner & Co., Inc., 69 Comp. Gen. 105 (1989), 89-2 CPD ¶ 492.

The agency contends that the IFB did in fact prohibit size order qualifications; specifically, the agency refers to a clause that appears beneath the "all or none" certification option in the IFB and states:

"BIDS QUALIFIED OTHER THAN AS PROVIDED ABOVE MAY BE CONSIDERED NONRESPONSIVE."

Because of the use of the precatory term "may," this provision is not an express prohibition. Moreover, when interpreted in light of the rest of the solicitation, we find no basis for construing this provision as a prohibition on size order bid qualifications.

In this regard, section L-1 of the IFB incorporated FAR § 52.214-10, Contract Award--Sealed Bidding, section c of which provides:

"The Government may accept any item or group of items of a bid, unless the bidder qualifies the bid by specific limitations. Unless otherwise provided

1/ Regarding all or none qualifications, FAR § 14.404-5 provides: "Unless the solicitation provides otherwise, a bid may be responsive notwithstanding that the bidder specifies that award will be accepted only on all, or a specified group, of the items."

in the Schedule, bids may be submitted for quantities less than those specified. The Government reserves the right to make an award on any item for a quantity less than the quantity offered, at the unit prices offered, unless the bidder specifies otherwise in the bid."

Additionally, section M-1 of the IFB expressly advised all bidders that:

"In addition to other factors, bids will be evaluated on the basis of advantages and disadvantages to the Government that might result from making more than one award (multiple awards). It is assumed, for the purpose of evaluating bids, that \$500 would be the administrative cost to the Government for issuing and administering each contract awarded under this solicitation, and individual awards will be for the items or combinations of items that result in the lowest aggregate cost to the Government, including the assumed administrative costs."

Where, as here, a solicitation permits multiple awards and states that the government may accept any item or combination of items, such a solicitation expressly indicates to bidders that they may include order limitations in their bid. See Orvedahl Constr. Inc., 63 Comp. Gen. 289, supra. In addition, as noted above, the IFB specifically allowed bidders to qualify their bids on an "all or none" basis.

Under these circumstances, we find that High Country's 35-item qualification was a permissible condition and operated in the same manner as Carlson's "all or none" qualification; contrary to the agency's assertion that the limitation modified the rights of the government or contradicted the material terms of the solicitation, High Country's qualification merely gave the agency notice that it would not accept an award for more than 35 items. See Phillips Cartner & Co., Inc., 69 Comp. Gen. 105, supra. In the event that the agency had made a partial award to High Country, this 35-item qualification would not have released the contractor from performing in accordance with the material provisions of the IFB. Accordingly, we find that High Country's bid was responsive.

CARLSON'S "ALL OR NONE" CERTIFICATION

As noted above, the IFB expressly provided that bidders could qualify their bids as "all or none"; in this regard, section B of the IFB states:

"Bidders wishing to bid on an "ALL OR NONE" basis must write "ALL OR NONE" in the following space:
_____."

In completing its certification, Carlson failed to write out the entire three-word phrase "all or none"; rather, in the certification blank, Carlson merely wrote "All." High Country maintains that because Carlson did not follow the exact instructions in the IFB, Carlson's bid was not properly qualified as "all or none" and, accordingly, award to Carlson is improper. High Country apparently concludes that because of the one-word qualification, Carlson could accept or renounce the "all or none" certification, depending on its relative standing among bidders.

Essentially, High Country is protesting that Carlson's "all or none" certification is ambiguous. An ambiguity in a bid exists only where it is subject to two reasonable interpretations. See RG&B Contractors, Inc.--Recon., B-225260.4; B-225260.5, Apr. 20, 1987, 87-1 CPD ¶ 425. Here, we find that the only reasonable interpretation of Carlson's qualification is that its bid was offered on an "all or none" basis. The certification was conspicuous and properly placed in the corresponding "all or none" certification blank beneath the bidder's signature and there is no basis for inferring that the term "all" pertained to anything other than the size of the order, which Carlson sought to qualify, especially since Carlson did in fact bid on all 98 items. Accordingly, contrary to High Country's assertion, since Carlson's bid was submitted on an "all or none" basis, Carlson did not have the option to decide after bid opening whether it would accept award on less than the total number of items bid. Pluribus Prods., Inc., 66 Comp. Gen. 86 (1986), 86-2 CPD ¶ 536.

AWARD TO CARLSON

If High Country's bid had been properly considered, the Forest Service would have faced two award options. Because Carlson qualified its bid as "all or none," the Forest Service could either make award for all 98 items to Carlson or disregard

Carlson's bid and make multiple partial awards to the remaining bidders, including High Country. Under the multiple award option, however, the agency would not have been able to obtain all 98 vehicles required. None of the three remaining bidders submitted a bid for 8 of the line items. In addition, High Country was the sole bidder on 64 other line items; given the order limitation in its bid, the agency could have made award to High Country for only 35 of those line items, leaving 29 unawarded. Thus, of the 98 line items, the agency at most could make award for 61. Such a result clearly would not have satisfied the agency's minimum needs since it would not have received all the vehicles it required. Accordingly, even though Carlson's bid was not low for all 98 items, because its bid offered the only means whereby the agency could procure all 98 vehicles, award to Carlson was proper.

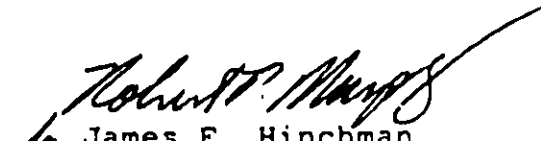
Prejudice is an essential element of a viable protest, and where no prejudice is shown, or is otherwise evident, our Office will not disturb an award, even if some technical deficiency in the award process may have occurred. Merrick Eng'g, Inc., B-238706.3, Aug. 16, 1990, 90-2 CPD ¶ 130. Here, the record clearly shows that even if High Country's bid had not been rejected as nonresponsive, the protester still would not have been in line for award since Carlson was the only bidder who could meet the agency's needs by supplying all of the required vehicles. Since High Country was not prejudiced by the agency's failure to consider its bid, we see no basis to disturb the award to Carlson.

THE "ALL OR NONE" QUALIFICATION

High Country also protests that because the "all or none" bid qualification option contradicts the purpose of a small business set-aside, award under the IFB nonetheless should be made on an item-by-item basis. According to High Country, by accepting qualified "all or none" bids, offerors with greater production capabilities gain the exact competitive advantage that the small business set-aside is designed to alleviate. We will not consider this portion of High Country's protest. Our Bid Protest Regulations require that protests based upon alleged improprieties apparent on the face of the solicitation must be protested prior to bid opening. See 4 C.F.R. § 21.2(a)(1) (1990). The option for "all or none" certification was clearly set forth in the IFB; to be timely, High Country should have protested this provision prior to the January 2 bid opening. In any event, "all or none" offers are

proper in small business set-asides as long as offers and awards are restricted to small business concerns. The Interior Steel Equip. Co., B-209016, Feb. 8, 1983, 83-1 CPD ¶ 139.

The protest is denied.


James F. Hinchman
General Counsel